In the Supreme Court

OF THE

UNITED STATES.

NO. 1002.

RELIEF JACKSON,
Plaintiff in Error,
vs.
JOHN D. ROBY and JAMES D. RANKIN, *Defendants in Error.*

ANSWER OF DEFENDANTS IN ERROR TO BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

NO. 1192.

JOHN D. ROBY and JAMES D. RANKIN, *Plaintiffs in Error,*
vs.
RELIEF JACKSON,
Defendant in Error.

ASSIGNMENT OF ERRORS.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

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There was no evidence offered by plaintiff to show a compliance with the statute of Colorado, relative to amount of work performed upon the two claims, viz: Lomax Gulch and Klak claim.

The statute cited, requires $100 to be expended in labor and improvements upon each claim, or the expenditure required by said act, for each claim, may be made on any one claim. Upon failure to comply with these conditions,

the claim or claims upon which such failure occurred, shall be open to re-location.

Sess. Laws Colo., 1879, p. 140.

If plaintiff in error claims the benefit of such statute, he must show full compliance with its terms. This he did not do, as to *amount* of labor or improvements required by the statute.

No claim of that kind was made, on the trial, but plaintiff in error sought to show that work was actually done on the Klak claim by the dumping of tailings thereon, and did not contend that sufficient labor and improvements were performed upon the one claim to hold both the Lomax and Klak claims.

In the case of *Smelter Co.*, vs. *Kemp*, 104 *U. S.*, 653, the Court say:

"Long before patents were allowed—indeed from the earliest period in which mining for gold and silver was pursued as a business—miners were in the habit of consolidating adjoining claims, whether they consisted of one or more original locations, into one, for convenience of working them. * * * * *

"Every one at all familiar with our mineral regions, knows that the great majority of claims, whether on lodes or on placers, can be worked advantageously only by a combination among the miners, or by a consolidation of their claims through incorporated companies. Water is essential for the working of mines, and in many instances can be obtained only from great distances by means of canals, flumes and aqueducts, requiring for their construction enormous expenditures of money, entirely beyond the means of a single individual. Often, too, for the development of claims, streams must be turned from their beds, dams built, shafts sunk at great depth and flumes constructed to carry away the debris of the mine.

* * * * * * * The statute of 1872, provides that on each claim subsequently located, until a patent is issued for it, there shall be annually expended in labor and improvements, one hundred dollars; and on claims previously located, an annual expenditure of ten dollars for each one hundred feet in length along the vein; but where such claims are held 'in common,' the expenditure may be upon any one claim. *

* * * * * Labor and improvements, within the meaning of the statute, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development; that is, to facilitate the extracting of the metals it may contain, though in fact, such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed for the turning of a stream, or the introduction of water, or where the improvement consists in the construction of a flume to carry off the debris or waste material."

How can it be said that this work in Lomax gulch, which was work upon that claim alone, was labor or improvements made for the development of the consolidated claim? Was it to facilitate the extraction of metals contained in the Klak claim? By no means.

Instead of that, the result was to cover the Klak claim with tailings and impede and retard the work of extracting metals therefrom.

This work on Lomax was not like the sinking of a shaft upon one, to determine and extract the wealth of two or three, claims. Neither was the work performed in Lomax of any benefit to Klak claim, such as the construction of a water ditch or a flume to carry off the debris or waste material from both claims. Without

doubt the Court, in the case cited *supra*, when using the language "constructing a flume to carry off the debris or waste material," referred to such enterprises as are common in California, to wit: the construction of a long bedrock flume below several claims for the purpose of carrying off debris and tailings from the several claims situated above; not such a flume as was constructed in Lomax gulch, which was for carrying off the debris and tailings from Lomax gulch only, and onto and over the Klak claim.

In the case at bar the flume extended down onto the Klak claim, not for the purpose of working the Klak claim or the consolidated claim, nor was it of any benefit to the Klak claim, but a positive damage, and the farther it extended the greater the damage, and the more it impeded work on the claim. Certainly such "labor and improvements were not within the meaning of the statute," and the case of Smelting Co. vs. Kemp, *supra*, does not apply to, nor control, this case. Again, the only question raised in that case was the validity of the patent, and much of the opinion is explanatory and general language without application to the question.

One general system may be adopted to work contiguous or adjoining claims. It is only when such a system is adopted that work in furtherance of the system is work on the claims intended to be developed by it.

Jupiter M. Co. vs. Bodie Con. M. Co., 7 Saw., 116.

Work done off a claim must have some direct relation to it.

McGarrity vs. Byington, 12 Cal., 427.

If the case of Smelting Co. vs. Kemp should be applied to the case at bar, then defendants in error maintain that

there was no proof to show that the act of Congress requiring an annual expenditure of a certain amount was complied with.

"Under this statute representation is the muniment of title. If representation fails, the title is gone. If there is a forfeiture, the claim becomes again subject to location. On each claim located prior to the passage of this act, $10 worth of work shall be performed or improvements made during each year for each 100 feet of such claim to prevent a re-location."

Belk vs. Meagher *et al.*, 3 Mont., 65, 77.

Unless the amount required by the act of Congress was expended on both claims, or on one for the benefit of both, then a forfeiture took place. The evidence of plaintiff, Jackson, does not disclose that sufficient labor and improvements were made to hold both claims; hence, forfeiture did take place. No presumptions can be indulged in. The act is positive in its terms, and its conditions must be complied with and fully proved.

Counsel for plaintiff claims, that the "work of dumping the tailings was all done on the Klak claim."

No one ever before claimed in any Court that the discharge of water, loaded with sand and gravel from the end of a flume, which is the dumping of tailings, was *work* upon a claim. If that could be construed into "work done upon a claim," then a miner, at the head of the Arkansas river, could he locate claims to its mouth, would work the whole distance by dumping tailings near its head; for every one knows that the tailings would lodge all along its banks for miles, and a few small pieces of tailings lodging upon, would work, each claim to the sea. Can anything be more ridiculous?

Counsel also contend, that "it is a mere truism to say that the construction of a flume on Klak claim, and the

actual use of it in washing for gold, was an expenditure in labor and improvements upon that claim."

What was there in the testimony to show when such flume was built? Work was commenced in Lomax in 1872.

Transcript of Record, folio 35.

It is but fair to presume that the flume was built on the Klak claim in the beginning of work on Lomax in 1872, and extended up Lomax as the work in that gulch progressed.

If that be true, then what becomes of the expenditure in labor and improvements upon Klak claim after the year 1872?

And if it be necessary to incur an expenditure for labor and improvements on the Klak claim for one year, it must be incurred each and every year. That certainly was not done, and not proved, as there was only 150 feet of flume on Klak claim, and that only for use to carry away Lomax tailings.

It could not take eight years to make such improvements. The claim would become open to location long before 1880.

There was no proof to show that these tailings were ever worked over, or were of any value, or were ever claimed by plaintiff in error. They were allowed to flow off and were abandoned.

Jones vs. Jackson, 9 Cal., 237.

If the tailings were abandoned and the ground upon which they were discharged never worked, why was not such ground abandoned?

The place of deposit for tailings may be appropriated, but the intention to do so must be clearly manifested by outward acts.

Jones vs. Jackson, *supra.*

In the case at bar, no intention to appropriate and work the premises in dispute, is shown. There is no testimony to show that plaintiff in error had any intention of working or developing the ground in question. He simply used it as a deposit for tailings, nothing more.

"Except in the manner aforesaid, neither the plaintiff nor his grantors were shown to have worked the premises in controversy, or to have been in possession of the same."

Transcript of Record, folio 35.

A party may take up a claim for mining purposes that has been and still is used as a place of deposit for tailings, by another, and his mining right will be subject to the prior right of deposit.

O'Keiffe vs. Cunningham, 9 Cal., 589.

That is the situation of the ground in dispute. The failure of plaintiff in error to work the premises either separately or by a common system, left the premises open to location, subject to the prior right of deposit for tailings. Defendants in error made such location, and went into possession but did not interfere with plaintiff's right to deposit his tailings thereon.

It has not been decided anywhere that the mere deposit of tailings on a claim, or such acts as were done on the Klak claim, amount to a holding of possession of the entire claim, as maintained by plaintiff in error.

Argument, page 5.

English vs. Johnson, 17 Cal., 107, cited by plaintiff, simply decides that when one is in possession of a claim properly staked and recorded, *and being developed and worked*, (the Klak claim was not being developed and worked) he may maintain trespass against an entry upon a portion of such claim.

The evidence in that case established the fact that notices were posted on the ground, and that a ditch was dug around the whole premises claimed; also that the ground could not be worked without draining the water reached in the shaft before the pay dirt. The plaintiffs were continuously working such shaft inside the claim so staked and ditched, and such shaft was intended to work the whole ground within the lines.

The Court in deciding the case say:

"A party may be in possession by himself or his agents or servants. Going on the lead to work it, or even work done in proximity and in direct relation to the claim, for the purpose of extracting or preparing to extract mineral from it, as, for example, starting a tunnel a considerable distance off to run into the claim, would be a possession of the claim within the meaning of the rule."

Plaintiff in error seeks to bring himself within that rule, and cites that case.

Was work in Lomax gulch in proximity and in direct relation to the Klak claim? It was in proximity, but its only relation to the Klak claim was to cover it up and prevent its ever being worked. Was work done in proximity and in direct relation to the Klak claim for the purpose of extracting or preparing to extract minerals from it?

If so, then the more debris and waste material deposited upon a claim, the better it is prepared to extract minerals.

Instead of starting a tunnel to *run into* the claim, possession is claimed for running the tailings of other workings *on* the claim.

In Rogers vs. Cooney, 7 Nev., 213, the plaintiffs surveyed and staked a long narrow tract upon which tailings were already deposited. They were continuously digging

up, hauling away and milling those old tailings; were in possession, working the staked premises and had a cabin built thereon.

While plaintiffs were so at work, defendant entered and he, too, commenced hauling away the tailings, and the only question decided was, which had the better right.

The only question decided in Jones vs. Jackson, 9 Cal., 237, was, if tailings were claimed by the company discharging them, could another appropriate them to his own use and deprive the company of them?

In the case of Golden Fleece Co. vs. Cable Cons. Co., 12 Nev., 312, a question was raised as to the proof of possession of a *quartz lode*. The Court say:

"But in fact the plaintiff did prove possession. It proved a clearly defined surface claim, surveyed and marked by a U. S. surveyor in accordance with law, including a quartz lode running with the claim, and *work on the vein inside* of the surface claim, and within the lines of the disputed ground"

In the case of the N. N. Mg. Co. vs. Orient Mg. Co., 6 Sawy. C. C., 299, a combination shaft, for the benefit, and to be used for the development, of all the claims, was being sunk, and, upon the question of possession, the Court charged the jury as follows:

"If you find these to be the facts, gentlemen of the jury, then there was not at this time merely a constructive possession of these mining claims by virtue of the mining laws alone, but an actual occupation and possession, a *possessio pedis*, a physical presence of the plaintiff by its officers, agents and servants, actually controlling and dominating the claims as early, at least, as the month of March or April, and the domination and possession extended to the bounds of the claims as described in the

conveyance to plaintiff under which it claimed title, and as indicated by the stakes planted by Anderson, and found by Scowden to mark the location, and the notices stating the extent of the claims—the claims lying, as the testimony tends to show, in one body, and conveyed by one deed to the same party, and *being developed by the same means as a part of one general system.*"

The case of English vs. Johnson, *supra*, clearly lays down the rule of possession of a claim, or part of a claim, not being worked.

The bill of exceptions of plaintiff in error does not show a case within the rule. It says: "Except in the manner aforesaid, by the extension of the flume, and using the place as a dumping ground, neither plaintiff nor his grantors were shown to have *worked* the premises in controversy, *or to have been in possession of the same.*"

Transcript of Record, folio 35.

There was no evidence to show that any gold was "cleaned up" or taken from the flume which extended over onto the Klak claim; or that it was of any actual use in washing gold; or that any gold was extracted from either claim; or that the tailings contained any gold at all; or that they were ever worked over; or that any dispute arose as to the tailings or place of deposit near the flume.

Defendants in error maintain that no possession, or right of possession, was in the plaintiff in error at date of location by defendants, or at date of commencement of this suit, and no *prima facie* evidence of title shown. But if a *prima facie* title was made out, the testimony of defendants in error clearly showed that the ground in controversy was vacant and unoccupied, and had been for years, except that Bartlett and Shock had located and

worked a portion thereof, and their claim purchased by the defendants in error.

Transcript of record, folio 42.

There was not sufficient title nor possession shown by plaintiff in error to warrant the Court in giving the case to the jury. There was a bridge on Blue river in 1869 (no one knows where it is to-day), a stake near a dam (which side the river is not shown), the whole country from hill to hill (whether bottom, middle or top no one knows), and a few abandoned tailings washed down from a foreign claim.

These are the muniments of title and evidences of possession that plaintiff in error relies upon to defeat the well marked and developed claim of defendants in error.

Defendants in error submit that the Court below was correct in deciding that plaintiff in error had not made a case sufficient for the consideration of the jury.

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